Supreme Court, U.S.
FILED

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No. _____

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

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MARGARET ANN BORZA,
PATRICIA HORVATH
And
All Others Similarly Situated,
PETITIONERS

VS

HALLMARK CARDS, INC., et al.,
RESPONDENTS

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether Disparate Impact Analysis Is Applicable in Age Discrimination Settings.

II. Whether the facts of this case support a Disparate Impact analysis pursuant to either an ADEA claim an ERISA claim or a MIXED claim as discussed by this Court in Hazen Paper Co. v. Biggins, 113 U.S. 1701, 61 L.W. 4323 (1993).

III. Whether Borza and/or Horvath, in their complaints and affidavits presented a prima facie case of Age Discrimination by the wrongful terminations coupled with the pension and profit sharing redistributions requiring the Court to allow discovery, and to require Hallmark to answer the complaints.

IV. Whether Borza and/or Horvath, in their complaints and affidavits presented a prima

facie case under ERISA, of pension and profit sharing inequities, requiring the Court to allow discovery, and to require Hallmark to answer the complaints.

V. Whether the Procedural Aspects of this case violated the strictures and model set out in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 5 F.E.P. 965 (1973) and subsequent cases, primarily Hazen Paper Co. v. Biggins, 113 U.S. 1701, 61 L.W. 4323 (1993).

VI. Whether Hallmark's Policy of Preferring younger employees to "Create a Young Image" is a Violation of the Age Discrimination in Employment Act (ADEA).

VII. Whether Hallmark's Policy of firing employees who, after many years of service, had accrued or were on the verge of accruing Substantial Portions of the

Employee Benefits Package, Violates (A) the Age Discrimination in Employment Act, OR (B) the Retirement Income Security Act, or both.

VIII. Whether the Court's stopping of discovery in light of the prima facie cases presented violates due process as established by McDonnell Douglas.

IX. Whether the District Court misapplied the teachings of this Court in Hazen as to the "mixed claims" of ADEA and ERISA violations presented in this case.

X. Whether, the evidence of record supports a finding of "No Constructive Discharge", where a pattern of "Disparate Impact" was presented, and the grounds relied upon were at least partially coerced statements which were recanted by Horvath.

XI. Whether the District Court abused its discretion in adopting Hallmark's self-serving statements when no opportunity to refute those statements was ever allowed as required by McDonnell Douglas once a prima facie case is presented.

XII. Whether Horvath Was Constructively Discharged under the facts of this case.

XIII. Whether The District Court's Failure to allow meaningful discovery was in violation of the Federal Rules of Civil Procedure thereby committing prejudicial error.

XIV. Whether the Disallowance of Horvath as an Intervenor, or a class member in Borza's class action complaint, violates joinder principles as contained in Federal Rule of Civil Procedure 23, and those aspects of Rule 23 that apply to ADEA cases under the teachings of Hoffman-La Roche V.

Sperling, 493 U.S. 165, 51 F.E.P. 853 (1989).

XV. Whether, at the very beginning of his case, the District Court Incorrectly Applied the Burden of Evidence In Deeming Plaintiffs Affidavits based on personal knowledge "Conclusory", under the standards applicable in EEO cases pursuant to McDonnell Douglas.

XVI. Whether the District Court Improperly Construed the Numerosity Requirement of Class action lawsuits, as "speculative", where the numbers were computed based on personal observation of a 15 year period.

XVII. Whether, the numerosity requirement of Rule 23, may be initially satisfied by raw estimates in a range which, at a minimum, clearly exceeds numerosity requirements, and is therefore, not "speculative".

XVIII. Whether, under the evidentiary standards applicable, the District Court prematurely decided a series of disputed facts in this case in favor of Hallmark's self-serving declarations where those reasons were not valid non-discriminatory reasons for the discharge, but mere pretext.

IXX. Whether the Fourth Circuit Court of Appeals erred in refusing to recognize the discriminatory effect of the diversion of pension benefits as directly related to the charges in this case of firing older employees.

LIST OF PARTIES

The Petitioners are:

1. Margaret Ann Borza
2. Patricia Horvath

for themselves and all others similarly situated as employees or former employees of Hallmark Cards, Inc.

The Respondents are:

1. Hallmark Cards, Inc.
2. Jerry Klein
3. Doug McClure

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MARGARET ANN BORZA, AND
PATRICIA HORVATH AND ALL OTHER SIMILARLY
SITUATED FORMER EMPLOYEES
OF HALLMARK CARDS, INC.,
PETITIONERS
VS.
HALLMARK CARDS, INC., ET ALL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners, Margaret Ann Borza and Patricia Horvath for themselves and all others similarly situated respectfully pray that a writ of certiorari issue to review the judgements and opinions of the United States Court of Appeals for the Fourth Circuit and to review the judgement and opinion of that court and the court below, which opinion was affirmed on appeal.

JUDGEMENTS AND OPINIONS BELOW:

The following judgements and opinions below are reprinted in the respective numbered appendix following:

Judgement and memorandum opinion of the United States Court of Appeals for the Fourth Circuit, denying Petitioners petition and suggestion for rehearing in banc, February 6, 1995.

a-1 to a-2

Judgement and Opinion of the United States Court of Appeals for the Fourth Circuit affirming in all respects the judgements of the United States District Court in these Consolidated Appeals, January 10, 1995.

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f-1 to f-5

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JURISDICTIONAL STATEMENT

(i) The Orders and Judgements sought to be reviewed are:

Judgement of the United States Court of Appeals for the Fourth Circuit denying Petitioners petition and suggestion for rehearing in banc.

Entered on February 6, 1995. (Ref. a-1 to a-2)

Judgement of the United States Court

of Appeals for the Fourth Circuit affirming all judgement of the United Stated States District Court.

Entered on January 10, 1995. (Ref. b-1 to b-3)

Final Judgement(s) of the United States District Court entered on December 3, 1993 and February 17, 1994 respectively.

Notices of Appeal were filed on Monday, January 3, 1994 and February 23, 1994 respectively. This court has jurisdiction under United States code, Title 28, section 1254 (1), to review the final decision of the United States Court of Appeals. All Appeals were timely.

STATUTES

29 U.S.C. §623 (a)(1), et seq.(ADEA)
Age Discrimination in Employment Act
29 USC Section 623

(a) Employer practices. It shall be unlawful for an employer-

(1) to fail or refuse to hire or

to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

29 U.S.C. §1132 (a)(1), et seq. (ERISA) Employee Retirement Income Security Act of 1974 (Sept 2), P.L. 93-406, 88 Stat. 832

29 USC Section 1132

(a) Persons empowered to bring a civil action. A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC 1109];

(3) by a participant,

beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title;

STATEMENT OF THE CASE

Petitioner, Margaret Ann Borza had worked for Hallmark Cards, Inc. nearly twelve (12) years. Petitioner Horvath had worked for Hallmark nine (9) years as of the date of her constructive discharge in 1993. During that time, Ms. Borza had observed numerous occasions, which were routinely joked about by supervisors, whereby older, long-term employees, virtually always employees over 40, were fired or forced to leave upon passing the age of 40. This occurred only after achieving a "fully participating" status in Hallmark's very lucrative pension, profit sharing and cash bonus plans of Hallmark for its employees **(the benefits package)**.

The pattern and practice joked about involved the cutting up of the "pie" by senior executives who shared in futuro in the redistribution of the benefits package for terminated employees for years

following the termination of those employees.

This redistribution or "cutting of the pie" benefited the persons doing the terminating (a part being diverted to themselves) and also other senior executives "up the line" in proportion to the sharing percentages contained in the formalized and ERISA governed plans in effect at Hallmark for all relevant years.

There came a time when Borza herself reached that sublime status (47 years old and 11 years into the benefits package) and true to the pattern, an excuse was made to terminate her. Her Hallmark superior promised to rehire her in the event the excuse for termination (loss of one customer account out of 30) was reversed. Shortly afterwards the customer was reacquired. However, her superior reneged. A patently false reason was given for the failure to rehire.

Borza timely filed a discrimination complaint with the Human Resources Division of Prince George's County, Maryland. The county acted on that complaint but withdrew its action upon Ms. Borza's objections. Neither the county or the EEOC took any final action on her complaint.

During the next several years, Borza learned of the virtual universal application of the pattern of discrimination complained about and verified her beliefs with fifteen (15) other former co-workers at Hallmark.

Eventually, Borza received a notice from the EEOC of extension of the time to file a civil action in a United States District Court. Three (3) days before the final deadline she retained the first attorney she ever hired in her life.

That attorney, the undersigned, filed this case on the last day of the Congressionally extended period allowed by

the extended statute of limitations. The complaint was filed as a class action complaint alleging age discrimination, wrongful termination, and the afore-described re-distribution of the benefits package. Several amended complaints enumerated the details of her prima facie case.

Later, after the United States Supreme Court ruled in Hazen Paper Co. v. Biggins, 113 US 1701, 61 LW 4323 (1993), Borza was required by the District Court to amend her complaint to split out and separate the claims of ERISA violations from those of the initial complaint with primary reliance on age discrimination.

Borza, however, always maintained her position that the practices complained of were part and parcel of just one scheme, age discrimination with two aspects of resulting damage. These were, (1) loss of wages by reason of the termination, and (2)

the loss of the benefits package which would have accrued had the employment not been wrongfully terminated.

Borza and counsel were requested by another former Hallmark employee, Patricia Horvath, who had been recently constructively discharged by Hallmark to join the on-going case as both a class member and (potentially) a class representative.

To accomplish Horvath's termination, Hallmark had used various intimidation tactics and abusive conduct. Horvath supplemented Borza's factual allegations to allege a virtually identical pattern and practice which had occurred for the period of time at least beginning with the Borza case and ending with Horvath's constructive discharge in 1993.

Together Borza and Horvath alleged a pattern and practice involving an invidious scheme having an disparate and adverse

impact on all Hallmark employees over 40 years of age, covering a period of time spanning from Borza's termination in 1985 through Horvath's termination in 1993. This extended period of time was possible under the then applicable statute of limitations because of the federal statute extending the time for filing age cases, the Age Discrimination Claims Assistance Act of 1990 (ADCAA I and II).

The complaints of Borza and Horvath were each carefully specified all of the elements of a prima facie case of age discrimination. Both complaints intended to rely primarily upon age discrimination violations, with the ERISA violations alleged as one element of damages and as a non-complying prohibited motive for the terminations.

Borza exhausted administrative remedies but Horvath did not. Horvath relied upon class action case law holding

that administrative exhaustion is unnecessary in a class action if the class representative has met all prerequisite requirements.

Horvath attempted to intervene in the on-going case of Borza which had been filed as a class action but her intervention was denied by the Court.

Hallmark never answered either complaint but rather filed a motion to dismiss alleging statute of limitations barring Borza's claim. The United States District Court granted the initial motion to dismiss on that (statute of limitations) ground.

However, upon the filing of a F.R. Civ. P. 59 (e) Motion to Alter and Amend the judgement, noting the extensions granted by Congress in ADCAA I and II [1/],

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[1/] Public Law No. 100-283 [s.2117]; April 7, 1988, Age Discrimination Claims Assistance Act of 1988, as amended to November 3, 1990, (ADCAA I and II).

reversed its decision. In fact there was no Statute of Limitations problem as to Borza's ADEA claims.

Borza then attempted discovery designed to prove the combined ADEA and ERISA pattern and practice about which she complained.

The United States District Court forbade discovery and granted Hallmark's second motion to dismiss based upon the United States Supreme Court's ruling in Hazen. Hallmark successfully argued that Hazen required Borza to separately state the elements of the ERISA violation claimed.

Borza's position continued to be that the ERISA violations were merely part of the pattern and practice from which flowed damages resulting from the pattern of age discrimination.

As a matter of factual pleading, Borza always claimed that the pattern and

practice complained of had two aspects. (1) was the termination of older employees to foster a "young image" in the company and, (2) the intent and motive of senior management to divert the future years benefits package for all years after the wrongful termination.

Borza argued that those monetary redistributions could not conceivably have been for a ADEA cognizable "bona fide non-discriminatory business purpose" since the intent and result (the practice of taking another individuals future interest in property for themselves) was essentially a dishonest act. That dishonest act could not legally furnish a "legitimate non-discriminatory business purpose" sufficient to satisfy that requirement of ADEA. In fact the excuse given i.e. that Hazen requires a separation of the elements of each violation, and those violations can not be cross-linked, was a mere evasion of

the purposes of both acts, ADEA And ERISA. Borza also argued, without avail, that Hazen specifically provided for a "mixed case" wherein the elements of both ADEA and ERISA are inextricably intertwined. This is the case here.

The United States District Court remained firm in its refusal to allow discovery and without requiring an answer to the prima facie case presented, dismissed both cases. On appeal to the Fourth Circuit Court of Appeals that court affirmed the judgement in all respects.

Neither the Appeals Court nor the District Court followed or even mentioned the McDonnell Douglas[2]/ or Griggs[3]/ models established by this Court to insure that due process in the Age Discrimination context. This petition is brought because

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1/ McDonnell Douglas v. Green, 411 U.S. 792, 5 F.E.P. 965 (1973)

[3]/ Griggs v. Duke Power Co., 401 U.S. 424, 3 F.E.P. 175 (1971).

the judgements below contravene a number of principles established by this court involving a broad spectrum of employment discrimination law.

Particularly egregious is the prohibition of discovery by District Court followed by the dismissal of the case for failure to prove required evidentiary elements in an "disparate impact" claim. Also particularly egregious is the court's failure to give any weight whatsoever to the affidavits and pleadings of the Petitioner, accepting instead as evidence, without opportunity for cross-examination or discovery, purported "evidence"contained in the self-serving declarations of Hallmark officials.

In essence, what the United States District Court did was to foreclose any exposure of the pattern and practice complained of in favor of accepting Hallmark's self-serving affidavits in

contravention of the procedural principle that at the initial stage of litigation, all factual disputes should be decided in favor of the Plaintiff. The rulings of the lower courts violate and do violence to all of the procedural principles initially established by this Court in McDonnell Douglas, supra. and its legion of progeny.

STATEMENT OF FACTS

Over an eleven (11) year period of her employment and another seven (7) years since her discharge in 1985, Petitioner Borza and Co-Petitioner Horvath had observed and kept track of Hallmark's policy and practice of employing persons at a low salary, waiting until they became senior persons over 40 in a fully participating status as to lucrative (50% of total earnings) profit sharing, pension and cash bonus plan (the employment benefits package), and then terminating those employees for pretextural reasons.

Another alternative egregious practice which was applied to Horvath, was to make employees' lives so miserable that the employee would be forced to resign.

Borza's superiors joked about this practice called "splitting up of the pie" each time an old time employee was forced to resign or was fired. Horvath's superior admitted that the practice was a nationwide policy, universal in application and involved hundreds and hundreds of employees. Borza and Horvath attested in affidavits that they observed the pattern and practice in operation. The existence of the pattern and practice as alleged was admitted several superiors to both Petitioners both in their jokes and in one serious discussion with Horvath. The fact that the pattern and practice existed as described in the complaints is present common knowledge throughout Hallmark.

There came a time when Borza, then 47

years of age, was terminated. Her tasks were given to two new young employees. The purported reason for the firing was the loss of one of Borza's wholesale accounts out of a total of thirty (30) customer accounts. In fact, that account was not lost because it was reacquired shortly after her pretextual firing. Further, shortly after her firing the pretextual nature of the reasons given for the firing became clear. Although her superiors promised to rehire Borza when the account was reacquired, a new and blatantly false excuse was given for Hallmark's failure to honor its agreement to he-hire her after the re-acquisition of the purportedly "lost" account.

In their complaints, Borza and Horvath enumerated in detail prima facie cases for themselves. They also stated in detail Hallmark's policy and practice resulting in the disparate impact upon other similarly

situated persons.

THE PRIMA FACIE CASE:

Specifically, Borza alleged that she was a member of the ADEA protected class, persons over 40 years of age, she presented proof that she was satisfactorily performing her duty and that she had a long history of documented excellent performance at Hallmark; she was nevertheless fired, and she was replaced by two (2) younger persons. She was given false and pretextual reasons for her dismissal.

Borza and Horvath also averred that they personally observed and were told by superiors that the pervasive pattern and practice amounted to a policy at Hallmark to terminate employees over 40 years of age to achieve "a young image of the company". As another consequence of the regular terminations, the employments benefits packages available to long-term employees, virtually all of whom were necessarily over

40, were diverted in subsequent years, to senior executives. Those senior executives were the same persons doing the firing. Respondents Klein and McClure were those next level executives as to Borza and Horvath.

Horvath averred she was over 40 years of age at all times relevant to her complaint and as such a member of the ADEA protected age group; she was qualified for her job, had received numerous commendations and the one reprimand she received was based on false and pretextual reason. Horvath alleged embarrassing, demeaning and false statements by management designed to destroy her credibility with her subordinates, and to create a working environment inimical to equal employment opportunities her. She also averred that, after her constructive discharge, a younger person was hired to perform her work.

THE IMPROPER MOTIVATIONS:

Both Petitioners averred that the true motivations were the result of the Corporate Philosophy and policy of Hallmark to divert the benefits package. This involved the admitted practice pursuant to the admitted policy to terminate the employment of approximately 25% of persons over 40 years of age each year. Horvath's Hallmark supervisor had admitted to her that the company maintains the policy of firing older employees to "maintain a young image of the company".

Thus, both Borza and Horvath alleged a prima facie case of age discrimination coupled with acts which were protected by ERISA. They also alleged that one consequence of the age discrimination allegations was that the benefits package was redirected in accordance with the jokes, to the line of senior executives. The company also benefited by hiring

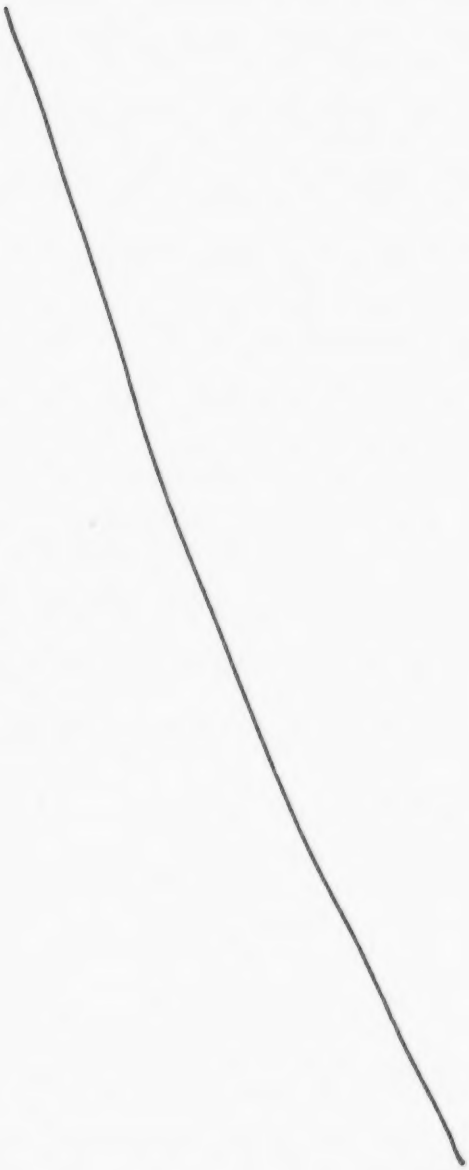
younger, cheaper, non-protected persons who were not entitled to the lucrative benefits packages until they put in their eight (8) years of prerequisite employment thereby qualifying as fully participating employees entitled to those lucrative benefits. As one element of their proof, Borza gave affidavits stating that she had interviewed over seventeen (17) former employee witnesses corroborated their allegations. No opportunity to depose those persons ever occurred because the Court aborted all discovery.

Borza and Horvath contend that the procedure followed by the United States District Court is in violation of due process and the standards established by this Court in McDonnell Douglas Corp. v. Green, supra, and the effect of the "disparate impact" theory analyzed by this Court in Hazen Paper Co. vs. Biggins, 113 US 1701 (1993). There is no reason why the

disparate impact theory should not apply to this case. In fact the reverse is true.

Both Borza and Horvath allege that the real reason for their discharge was that they had reached the magic age and magic status of "fully participating little old ladies" where they were part of the 25% of all persons who were to be automatically terminated by Hallmark's age discriminatory policy. They submit that the reasoning of this Court in Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964) holding that a proof of a discriminatory motive is not required under a "disparate impact" theory is fully applicable to the facts of this case even though admissions appear to supply the missing motive. Here what both Borza and Horvath allege a massive pattern and practice that resulted in each one of their terminations although those terminations

were nine (9) years apart. Of course, the practices complained about continued for that entire time as they do today.



SUMMARY OF ARGUMENT FOR GRANTING CERTIORARI

HALLMARK'S CORPORATE PHILOSOPHY IS UNLAWFUL:

In these two consolidated cases Petitioners Borza and Horvath were denied the opportunity for any discovery to prove their sworn allegations of an Unlawful Corporate Philosophy at Hallmark Cards, Inc. which resulted in a pattern and practice amounting to an invidious "adverse impact" in violation of (both) the Age Discrimination in Employment Act, 29 U.S.C. 623 (a)(1) et seq (ADEA) and 29 U.S.C. §1132 (a)(1) et seq, (ERISA). Willful violations of both of those Federal Statutes were alleged.

The acts complained of resulted in regular terminations of 25% of persons over 40 each year. The intent(s) of the Corporate Philosophy and Policy was to "create a young image of the company", and as part and parcel thereof, to reroute the

individuals' contractually promised employment benefits package(s) to the pockets of the Hallmark executives. This was the operative effect of the re-direction of funds for all years after the controlled and engineered terminations. This was simply because the young replacement persons were not yet eligible for the benefit packages to which the long-term older persons were entitled under the existing benefits package.

THE BENEFITS PACKAGE DIVERTED WAS LARGE:

Those fringe benefits, for employees over 40, amounted to a very large proportion of the total earnings of each employee terminated (about 50% in Borza's case for the year of termination) because those fringe benefits increased dramatically with each additional year of service at Hallmark. Borza was 47 at the time she was fired with a total of eleven (11) years of prior service with Hallmark.

She, after years of starvation wages, was just then starting to earn a decent living. Horvath was 50 when she was constructively discharged with nine (9) years of prior service.

Petitioners argue that these practices had an adverse impact on themselves, causing their terminations for which false and pretextual reasons were given, and also had the same result for over two hundred and fifty (250)[1]/ potential class members, nationwide.

Borza and Horvath submit that their allegations should have been taken as true, at least until <u>after</u> at least <u>some reasonable</u> discovery was allowed.

The Court failed to consider applicable procedural case law i.e.

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[1]/ The District Court ordered Plaintiffs to determine "numerosity" , denied access to discovery, then ruled that Plaintiffs sworn estimates of numerosity based upon personal observations at Hallmark conventions, as "speculative".

McDonnell Douglas v. Green, supra and its progeny before ruling. Petitioners submit that once Plaintiffs and made out a prima facie case of the adverse impact of the unlawful corporate philosophy, policy and practices, the stopping of discovery was improper. Hallmark then should have been required to answer the complaints and carry their burden of proceeding to answer the prima facie case presented. Because the District Court abused its discretion, this was not done. As the result, the nationwide unlawful violations of both ADEA and ERISA by Hallmark on a nationwide base remain unredressed and continue, on information and belief, even to this day.

Here, what both Borza and Horvath alleged and swore to is a massive pattern and practice that is the essence of age discrimination and the essence of a disparate impact case. Neither Borza nor Horvath had the opportunity to conclusively

prove the allegations of each of the elements of their age case because the discovery was stopped by the Court[5]/.

The blatant admissions by Hallmark executives that they had a policy and practice to terminate 25% of older persons each year and that it was for the reason to create a "young image of the company" is sufficient standing alone to support Borza and Horvath's prima facie verified allegations of age discrimination. Nothing in this case has refuted those sworn allegations and nothing should be heard to refute those allegations since no discovery was ever allowed.

In addition, no "legitimate non-discriminatory business purpose" for the admitted policy of terminating employees so

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[5]/ However they did submit documents showing good performance, commendations, and five(5) affidavits supporting the facts as alleged. The Court simply refused to give any credence to what Plaintiffs were averring.

they could "cut up the pie" has ever been presented by Hallmark. Discovery on that issue also was stopped.

The Supreme Court's analysis of the relationship between "disparate treatment" and an "disparate impact" is instructive to an appropriate analysis of this case. This Court in Hazen supra (at 1705 and 1706) carefully analyzed the inter- relationship of disparate treatment cases with disparate impact cases. In this case, the thrust of Borza's and Horvath's allegations were that a disparate impact situation existed. Those allegations should not be set aside, ignored or ruled as non-probative merely by presentation of self-serving document prepared by Hallmark's attorneys.

Borza and Horvath for themselves and all others similarly situated alleged and prima facie proved that the analysis of applicable law as contained in Hazen applies here. That analysis states:

"[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is no required under a disparate-impact theory. Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964). Hazen at 1705, 1706.

* * *

It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. Hazen supra at 1706."

To fire little old ladies only to "achieve a young image" as the Hallmark supervisor admitted, is exactly what this court described immediately above. To do this at the peak of earnings, to line the terminator's own pockets, is a despicable and illegal act in violation of both protective statutes, ADEA and ERISA.

29 U.S.C. § 623 (a) and (i)(1) place pension violations squarely within the ambit of ADEA. The fact that pretextual firings may accomplish the same prohibited goals, not for the year of firing, but for future years, makes the acts no less onerous or less illegal. The facts alleged here clearly violate the congressional intent to stop the very abuses so evident in this case.

For this reason, this case is important. The abuses described in this case ore certainly wide-spread with this Respondent. To the extent practices of

this type are commonplace in the country as a whole, it should be stopped. This Court should act in this regard in accordance with its own conscience and grant Certiorari.

ARGUMENT FOR ALLOWING THE WRIT

The Civil Rights Act of 1991 made it eminently clear that the Griggs, supra line of cases as to disparate impact should be given increased importance, overruling Wards Cove,[6]/. Summary judgement was premature in this case and this Court's decision granting judgment on behalf of Hallmark should be vacated. This is simply because material facts are in dispute and the facts alleged by Plaintiff provide a prima facie case, even without any discovery.

The Supreme Court has never addressed the question of whether a disparate impact theory can be applied in an age discrimination case. Hazen supra at 1706[2]. However, a number of other Federal Courts have addressed this issue.

This case demonstrates the need for a

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[6]/ Wards Cove Packing Co. v. Atonio, 491 U.S. 642, 49 FEP 1519 (1989)

clarification by this Court on this important point.

THE DIRECT EVIDENCE IN THIS CASE PRECLUDED DISMISSAL

Direct evidence will be found only in the most blatant situations. Age stereotypical reasons, such as the observation "that older employees have problems adapting to changes and to new policies," may, however, constitute direct evidence.[7]/ And that sort of evidence is averred in this case. And the direct evidence is substantial. Admissions by managers occurred and seventeen (17) witnesses in the small area worked by Petitioners also observed the acts

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[7]/ Direct evidence is seldom available; this is because Defendants are rarely courteous enough to admit in some documented form that an asserted rationale behind a discharge is really a pretext for an illicit motive. Burns v. Texas City Refining, Inc., 890 F.2d 747, 751 (5th Cir. 1989). Accord, Castleman v. Acme Boot Co., 959 F.2d 1417, 1420 (7th Cir. 1992). But here, both complainants aver that such remarks have been, in fact, orally made to them.

complained of herein.

Both Borza and Horvath have submitted letters of commendation which prove, at least as a prima facie matter, that their job performance was satisfactory or better. They also have alleged and submitted evidence of the real motivation for the prohibited acts, both motivations being in violation of EEO law.

Once the employer articulates a legitimate, non-discriminatory reason for adversely treating the Plaintiff, the burden of going forward returns to the Plaintiff who must show that the articulated reason is either not true or, if true, simply a pretext for the more likely motivating factor of age.

The District Court required none of that proof from Hallmark. What evidence that was submitted and relied upon by the court was, according to Petitioners' affidavits false and self-serving.

THE ALLEGATIONS IN THE AMENDED COMPLAINTS SUPPORTED THE "DISPARATE IMPACT" THEORY OF THIS CASE AND ALSO DISPARATE TREATMENT

The allegations contained in the complaint clearly set forth a claim of "adverse impact" although that specific term of art was not used until late in the pleading process. The averments also demonstrate the existence of a classic case for "disparate treatment".

The second amended complaint, received by the District Court stated in pertinent part.

> Borza alleges, that a common continuing pattern and practice exists, nationwide, of terminating older employees who have attained higher salary earning and benefit levels and replacing these older employees, by reason of their age, with less qualified, less senior and younger persons. The older protected persons are terminated for age based

reasons without just cause or any legitimate, non-discriminatory reason for the discharge in willful violation of ADEA. *** a high turn-over rate (about 25% each year for employees over 40) is engineered by Hallmark management. Borza and each member of the class she seeks to represent are victims of that policy and practice.

Borza clearly alleged a prima facie case of age discrimination applicable to her.

She alleged in her second amended complaint page 5 and 6, paragraph 8.

"*** A. She was over 40 years of age at all times relevant to her complaint and as such a member of the ADEA protected age group.

B. She was qualified for her job. She has received numerous commendations, no reprimands, and received a letter of appreciation upon

her discharge stating she would be rehired.

C. She was nevertheless fired.

D. Younger person(s) were hired to perform her work.

E. The reasons given her for her discharge were not legitimate non-discriminatory reasons and, in fact, were false.

F. The true reasons involved:

(1) Willful violations of ADEA in discriminating against older persons pursuant to an age based policy to terminate the employment of approximately 25% of person over 40 years of age each year.

Plaintiff further alleges that, in addition to practices complained of above involving wrongful termination by firing, Hallmark, as a pattern and practice, assigns older protected employees onerous and demeaning tasks,

for the specific purpose of causing those employees to resign in order to further Hallmark's policy of terminating older protected employees. The effect is a forced resignation by coercive and improper methods. These methods include false ratings and manipulation of budgets and required sales levels. Also, the rules for measuring performance of older employees were inconsistently applied.

In this situation, Borza alleged and supported by five detailed affidavits her prima facie case.

It was prejudicial error by the District Court not to require an Answer by Hallmark to the Complaint and not to allow the discovery sought and to decide the case against Plaintiffs based upon its erroneous perception of the facts.

The District Court refused to recognize or apply the "Disparate Impact"

of the Hallmark policies and practice upon either of the potential class representatives, or upon the members of the putative class. The Court below should have considered the substantially different posture of the case, as filed, as a class action, whether or not it was a Federal Rule of Civil Procedure 23 class action or an "opt in" ADEA collective action.

THE DISTRICT COURT ERRED IN NOT APPLYING CLASS ACTION PRINCIPLES TO THIS CASE AND NOT ALLOWING A PROSPECTIVE CLASS MEMBER (HORVATH) TO INTERVENE WITHOUT ADMINISTRATIVE EXHAUSTION OF REMEDIES:

The disparate impact theory in age discrimination cases was relied upon in Geller v. Markham, 635 F.2d 1027, 24 FEP 920, (2nd Cir. 1980), cert. denied, 451 U.S. 945)(1981) (Plaintiff not required to show that age discrimination sole cause of discharge; must only show that age was a factor which made a difference, age a "but for" cause); Smith v. University of N.C., 632 F.2d 316, 333, 23 FEP 1739 (4th Cir.

1980) (age need not be sole reason but it must have been a substantial or motivating reason--a determinative reason--in an employer's determination). The recent trend is to allow the adverse impact theory in age cases.

The District Court was therefore, erroneous in its legal determination applying Borza's claims of a viable disparate impact theory to the facts as alleged. Further, it ruled, without considering whether or not the adverse impact theory could be applied to the facts of this case, that the adverse impact theory was inapplicable in an age discrimination case, although it recognized the validity of that theory. The Court then (See the District Court's analysis at C-9 to C-11) eliminated prospective intervenor Horvath from the prospective age class, and then eliminated her as a potential ERISA class representative

because Horvath (1) failed to exhaust administrative remedies in the age claims [8], and (2) dismissed all of Horvath's ERISA claims because the Judge believed the self-serving statements of Hallmark as to Horvath's purported voluntary resignation.

Apparently, the Court simply failed to read the relevant parts of the complaint cited above.

PROCEDURAL DUE PROCESS WAS VIOLATED BY BARRING DISCOVERY--THEN DISMISSING THE CASES FOR LACK OF PROOF:

Discovery designed to prove the adverse impact of the unwritten Corporate Philosophy was designed and served upon Hallmark by Borza's counsel. That discovery was oriented around proving the policy so well known to be in nationwide usage (implemented) at Hallmark. Five separate affidavits of Borza and Horvath

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[8] The Court failed to note that in a class action, members of a class, as Horvath sought to be -- do not have to exhaust administrative remedies.

proved the pretextual nature of both employment terminations.

Without explanation or reason, the entire discovery process was stopped before it ever got off the ground. The District Court required Plaintiff's counsel to prove the numerosity of the alleged class violations, but when that was accomplished, dismissed all claims anyway.[9]/

Since Borza and Horvath alleged a prima facie case of disparate impact, there is no possible way that Hallmark could have prevailed on the basis of affidavits because all of Borza and Horvath's evidence must have been taken as true. Further, upon proving a prima facie case under the Federal Rules of Civil procedure, Rule 26 et seq. those Plaintiffs had an absolute

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[9]/ Defendant Hallmark's initial attempt at dismissal erroneously based on non-existent statute of limitations considerations was granted. However, when this error was brought to the Court's attention via a F.R. Civ. P 59(e) Motion to Alter or Amend.

right to pre-certification and pre-trial discovery. To deny that discovery was egregious error by the United States District Court and abuse of its discretion.

Borza and Horvath estimated, based upon their own observation, that approximately 250 persons nationwide will be affected by the outcome of this lawsuit. The fact that the United States District Court, and the Fourth Circuit Court of Appeals have seen fit to override the procedural due process aspects of a large and important age discrimination case gives full and adequate reason standing alone for the granting of Certiorari.

The fact that both the lower court and the Fourth Circuit Court of Appeals misconstrued Hazen and its holdings and application to this case is of sufficient importance to require clarification by this Court in the determination of the framework of this case in relation to the Federal

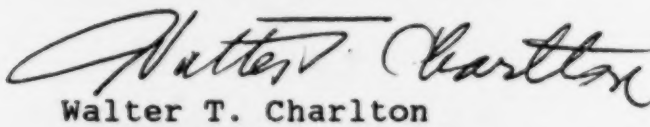
Rules of Civil procedure to preclude further expansion of any theory whereby an employment discrimination case can be dismissed after statement of a prima facie case without access of the Plaintiffs to the normal rules of discovery and the opportunity to gather proof. Such a procedure and the disallowance of discovery amounts to a substantial miscarriage of justice affecting at least 250 persons. This Court should grant Certiorari to enforce its prior teachings in McDonnell Douglas, supra and Griggs, supra, which have been ignored by the Courts below. The effect of the lower Court's ruling in this case cancels the principles of employment discrimination law which fairly spread the burden of proceeding in an EEO case and places it all back on the Plaintiff, without requiring the Defendant to carry its burden of responding once the Plaintiff has presented its own prima facie case.

Not only is this basic principle violated but massive violence to the Federal Rules of Civil Procedure denying reasonable discovery have created this intolerable situation for which this Petition requests review.

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
February 6, 1995

No. 94-1092
CA-92-240

MARGARET ANN BORZA, and all others similarly situated
Plaintiff - Appellant

and

ISSIE JENKINS; PATRICIA HORVATH
Parties in Interest

v.

HALLMARK CARDS, INCORPORATED, t/a Ambassador Cards; JERRY KLEIN, District Manager
Defendants - Appellees

No. 94-1268
CA-92-240

MARGARET ANN BORZA, and all others similarly situated
Plaintiff - Appellant

and

ISSIE JENKINS; PATRICIA HORVATH
Parties in Interest

v.

HALLMARK CARDS, INCORPORATED, t/a Ambassador Cards; JERRY KLEIN, District manager
Defendants - Appellees

No. 94-1269
CA-94-13

PATRICIA HORVATH
Plaintiff - Appellant

v.

HALLMARK CARDS, INCORPORATED, t/a Ambassador Cards; DOUG MCCLURE
Defendants - Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Margaret Ann Borza, and all
others similarly situated,
Plaintiff-Appellant,
and
Issie Jenkins; Patricia Horvath,
Parties in Interest, No. 94-1092
v.
Hallmark Cards, Incorporated, t/a
Ambassador Cards; Jerry Klein,
District Manager,
Defendants-Appellees.

Margaret Ann Borza, and all
others similarly situated,
Plaintiff-Appellant,
and
Issie Jenkins; Patricia Horvath,
Parties in Interest, No. 94-1268
v.
Hallmark Cards, Incorporated, t/a
Ambassador Cards; Jerry Klein,
District Manager,
Defendants-Appellees.

Patricia Horvath,
Plaintiff-Appellant,
v. No. 94-1269
Hallmark Cards, Incorporated, t/a
Ambassador Cards; Doug McClure,
Defendants-Appellees

Appeals from the United States
District Court for the District
of Maryland, at Baltimore,
Frank A. Kaufman, Senior District Judge.
(CA-92-240, CA-94-13)

Argued: November 1, 1994
Decided: January 10, 1995

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Walter Theodore Charlton, Arlington, Virginia, for Appellant. Jana Howard Carey, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellees. ON BRIEF: Todd James Horn, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Margaret Ann Borza and Patricia Horvath filed these actions on behalf of themselves and others similarly situated, contending that Hallmark Cards, Inc., in discharging them, discriminated against them by reason of their age and seniority in order to save the company the cost of higher salaries and benefits provided to older employees. Borza and Horvath allege violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et

seq., and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.

Borza was discharged on August 27, 1985, from her employment at Hallmark Cards as a wholesale account coordinator. The company gave as its reason the fact that it had lost a major account, making it necessary to eliminate Borza's territory and effect a reduction in force. Borza was 47. After Borza was discharged, her remaining accounts were reassigned to two other younger persons. Borza had been employed by Hallmark Cards for 11 years, and at the time of her discharge, was performing her job adequately. Subsequent to discharging Borza, Hallmark Cards gave her a favorable letter of reference, stating:

> Margie [Borza] has always demonstrated an excellent work ethic and had a good working

relationship with her accounts and peer group. She always had a positive attitude during her tenure with the company.

Margie was a valued employee of this Corporation and would be rehired if the opportunity was available.

Borza believed that she was discharged by Hallmark Cards because she was approaching retirement and because she believed that the company discharged older people with vested benefits to save money. Following her discharge, Borza spoke with other employees at Hallmark Cards and learned that other older employees, who had been terminated by Hallmark Cards, were replaced by younger persons. In December 1985, she filed a complaint with the Prince George's County Human Relations Commission in which she alleged that even though Hallmark Cards had stated that it was

terminating her "because of the loss of the Safeway Stores" and that "it was necessary to eliminate one territory within our district," the true reason for her discharge was that "she was getting close to the retirement age and [Hallmark Cards] was looking to replace her with a younger person that would save the company monetarily in salary and retirement benefits." Following a hearing, the Prince George's County Human Relations Commission found that because of the geographical location of the lost account, three account coordinators were candidates for discharge, Borza and two other women, ages 46 and 43. The Commission found that Borza was selected because of her location and performance:

> [Hallmark Cards'] review of the proximity and evaluations made [Borza] the likely candidate [for discharge], inasmuch as she was

> further from the clients, and her ratings were "Good," while her co-workers were "Very Good." Further, [Borza] had been placed on probation in 1983 (based on a Fair rating in 1982), while one of her counterparts was named Regional Account Coordinator of the Year.

The Commission noted that Borza was eligible for rehire by Hallmark Cards but was not subsequently rehired because after Borza left her job, three deficiency reports were received in connection with her accounts involving her failure to return stock and make credits in an amount totaling more than $5,000. The Commission concluded that "no reasonable cause" existed to believe that Borza was discharged because of her age.

Borza thereafter filed suit in the district court, alleging that Hallmark

Cards engaged in a pattern and practice of "terminating older employees who have attained higher salary earnings and benefit levels and replacing these older employees, by reason of their age, with less qualified, less senior and younger persons." She alleged further that this practice was undertaken in conjunction with "a company-wide policy whereby the substantial future fringe benefits, which are protected by ERISA for those employees terminated, are re-distributed to the executive level employees remaining at Hallmark." She brought her action under the ADEA, 29 U.S.C. § 623, and under ERISA, 29 U.S.C. § 1140.

Horvath resigned from Hallmark cards on April 27, 1993, under pressure brought about by negative comments about her performance, conflicting directives from her superior and "continuing criticism." She was 51. She acknowledges that after

almost a year of criticism about her performance, she received an advance copy of an unsatisfactory performance report notifying her that she "would be placed on a confidential probationary period of three months." She acknowledges also receiving a reprimand for the way she hired an employee. Because she disagreed with some of the evaluations and felt that she was being singled out for criticism, she concluded, "I could no longer stand the abuse and I resigned as implied by their conduct." Believing that she was constructively discharged so that Hallmark Cards could "divert from me to Hallmark executives the very large benefits to the remaining executives resulting from transfers of otherwise payable Bonuses, Profit Sharing and Pensions from employees who are discharged or forced to resign, to executives who remain," she filed suit in the district court. The complaint, which

parallels Borza's, was consolidated with Borza's complaint.

Considering the complaints of both Borza and Horvath, the district court granted Hallmark Card's motion for summary judgment and entered judgment for Hallmark Cards on both complaints in the consolidated action.

The district court dismissed the ADEA claims because the allegations that older employees were terminated by Hallmark Cards to avoid paying them higher salaries and benefits failed, by reason of Hazen Paper v. Biggins, 113 S. Ct. 1701 (1993) (noting that an employee's discharge to prevent pension benefits from vesting was based on seniority and not age), to state an age discrimination claim. The court observed that any allegation made in the complaint that characterized such a termination as "age based" disparate treatment was conclusory. Moreover, efforts by Borza and

Horvath to allege disparate impact claims under the ADEA also could not succeed because no facially neutral practice was identified that impacted older persons as a group more harshly than younger persons as a group. As the court stated in addressing Horvath's disparate impact allegations:

> Ms. Horvath does not, and indeed cannot, point to a neutral employment practice used by defendant which adversely affects older employees. Rather, her claim of constructive discharge is a claim of disparate treatment, i.e., it requires proof of specific intent to discriminate on the part of the employer.

Without deciding whether a disparate impact claim could state a cause of action under the ADEA, the court concluded that in any event one had not been alleged. Finally as

to Horvath only, the court stated that she had failed to file a prerequisite claim with the EEOC.

While the court recognized that Borza and Horvath could allege causes of action under section 510 of ERISA, it nevertheless dismissed those claims also. Because Borza was discharged in August 1985, her complaint filed in January 1992 was barred by the applicable three-year statute of limitations. See Dameron v. Sinai Hospital of Baltimore, Inc., 815 F.2d 975 (4th Cir. 1987). Moreover, the court concluded that Borza's earlier filing of her ADEA claim did not toll limitations for purposes of filing an ERISA claim.

While Horvath's ERISA complaint was not barred by the statute of limitations, it was found to be speculative because the undisputed evidence submitted by Hallmark Cards demonstrated that Hallmark Cards' executives did not monetarily benefit from

Horvath's resignation or from the resignation of any employee, contrary to Horvath's allegations. Hallmark Cards' employees, including its executives, were members of a defined benefit plan through which an employee who retires after 65 receives an annual retirement benefit equal to one percent of the employee's career earnings at Hallmark Cards, payable monthly. Thus, under the plan, one employee's pension benefits did not increase by the termination of another. The court also concluded that the facts presented by Horvath concerning her employer's treatment of her performance did not amount to a constructive discharge under applicable authority. In order to support a claim of constructive discharge, Horvath was required to allege (1) deliberateness of Hallmark Cards' actions aimed at bringing about her resignation and (2) the objective intolerability of the

working conditions at Hallmark Cards. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert denied, 475 U.S. 1082 (1986). The court concluded that Horvath had alleged neither element. While Horvath described numerous incidents in which she was rebuked for performance deficiencies, she acknowledged that these incidents were attributable to performance. Further, she admitted that when she left her employment, her working conditions were "fair" and she would recommend Hallmark Cards, "with reservation," to a friend as a place to work. The frustrations, criticism, and confusion from conflicting instructions which she described were held not to amount to a constructive discharge under the Bristow standard.

We have reviewed carefully the record and considered the arguments of the parties advanced in their briefs and at oral argument. We have reviewed the legal

conclusions applied by the district court to the undisputed facts, taking the facts in a light most favorable to the plaintiffs, and find no error. Thus, for the reasons given by the district court in its memoranda granting summary judgments in these consolidated cases, see Borza v. Hallmark Cards, Inc., Civil No. K-92-240, and Horvath v. Hallmark Cards, Inc., Civil No. K-94-13, in the United States District Court for the district of Maryland, we affirm.

AFFIRMED

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

MARGARET ANN BORZA, ETC.	*	
v.	*	K-92-240
HALLMARK CARDS, INC., ETC. ET AL.	*	
PATRICIA HORVATH	*	
v.	*	No. K-94-13
HALLMARK CARDS, INC., ETC., ET AL.	*	
	*	

ORDER

Judgments are hereby entered for each and all of defendants in each and both of these two cases. It is so ORDERED this 14th day of February 1994.

/s/
Senior United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

MARGARET ANN BORZA, ETC.	*	
v.	*	K-92-240
HALLMARK CARDS, INC., ETC. ET AL.	*	
PATRICIA HORVATH	*	
v.	*	No. K-94-13
HALLMARK CARDS, INC., ETC., ET AL.	*	

MEMORANDUM AND ORDER

(1) Reference is hereby made to the following documents:

a. plaintiff's motion to intervene filed August 4, 1993;

b. defendant's motion to deny Ms. Horvath's Motion to Intervene, or in the alternative, motion to dismiss, and objections to Horvath's interrogatories, filed December 16, 1993;[2]

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[2] Because documents outside the pleadings are included in the record in this case, defendant's motion to dismiss is treated as one for summary judgment

c. plaintiff's motion to certify a class, filed December 23, 1993;

d. plaintiff's amended complaint, and opposition to the motion for summary judgment filed December 28, 1993;

d.[sic] plaintiff's motion to compel, motion to consolidate, and opposition to defendant's motion to dismiss, filed January 6, 1994;

e. defendant's opposition to plaintiff Horvath's motion to file an amended complaint and motion to certify a class, filed January 7, 1994; and

f. defendant's reply to plaintiff's response to defendant's objections to Horvath's interrogatories, and

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pursuant to Fed. R. Civ. P. 12 (b) and 56.

defendant's opposition to plaintiff's motion to consolidate, filed January 21, 1994.

For the reasons stated herein, defendant's motion for summary judgment will be granted.

(2) The original lawsuit in this case, Case No. K-92-240, filed by Ms. Borza on January 27, 1992, alleging that defendant discriminated against her on the basis of age in violation of the ADEA.[3] Ms. Borza alleged essentially that defendant fired her because she was a senior employee nearing the full vesting of her benefits. Following the Supreme Court's decision in Hazen Paper Co. v. Biggins, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), which appeared to preclude Ms.

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[3] Further detail of the facts in this case may be found in this Court's Memorandum and Order dated November 24, 1993.

Borza's ADEA claim, this Court permitted Ms. Borza to amend her complaint. In her amended complaint, filed on July 6, 1993, Ms. Borza alleged an ADEA violation, an ERISA violation, and a combined ADEA/ERISA violation on behalf of herself and a proposed class of similarly situated persons. On August 4, 1993, plaintiff filed a motion to add Ms. Horvath as an intervening party and as a co-class representative in connection with the ADEA, ERISA, and joint ADEA/ERISA claims instituted by Ms. Borza.

In this Court's Memorandum and Order dated November 24, 1993, this Court granted defendant's motion for partial summary judgment on all of Ms. Borza's claims. This court also granted defendant's motion for partial summary judgment on Ms. Horvath's motion to intervene in connection with the individual and class ADEA and ADEA/ERISA claims instituted by Ms. Borza.

M&O, ¶ 10. However, this Court permitted Ms. Horvath to file a motion for class certification in connection with her ERISA claim and to engage in limited discovery to support her ERISA claim. M&O, ¶ 11. In a Memorandum and Order dated December 16, 1993, this Court denied Ms. Borza's motion to certify for immediate appeal to the United States Court of Appeals for the Fourth Circuit and motion for reconsideration filed December 10, 1993. In that Order, this Court afforded to Ms. Horvath the opportunity to file an amended complaint by December 28, 1993. In addition to filing her amended complaint by that date, Ms. Horvath filed a new protective lawsuit, Case No. 94-13, on January 3, 1994, which is identical to her amended complaint filed in Case No. 92-240.

(3) Ms. Horvath's said amended complaint alleges that she was an employee of defendant for over nine years until she

was constructively discharged on April 27, 1993, when she was fifty years old. Ms. Horvath worked for four years as a merchandiser and for five years as an account coordinator, a position in which she allegedly received praise from her superiors and exceeded her sales goals. According to Ms. Horvath, she stopped receiving praise when she turned fifty, and instead became subject to "abusive behavior and embarrassment in front of subordinates." Amended Complaint, p. 6. Following her alleged constructive discharge a younger person was hired to perform her work.

Ms. Horvath makes her claims on behalf of herself and all other similarly situated persons pursuant to both ADEA and ERISA. Ms. Horvath contends that defendant terminated and/or constructively discharged older employees, who have higher salary earnings and benefit levels, in favor of

younger employees. She alleges that older persons were fired and/or constructively discharged because defendant wanted to promote a youthful image for the company, and because defendant sought to divert "otherwise payable lucrative pension, bonuses and profit sharing proceeds from the person terminated to the senior executives." Am. Comp., p. 3. According to Ms. Horvath, "her firing was the result of both disparate treatment and the disparate impact of a prohibited policy and practice of Hallmark." Am. Comp., p. 6

(4) In order to clarify the procedural posture of this case, plaintiff's motion to consolidate Cases No. K-92-240 and No. K-94-13 is hereby GRANTED.

(5) Ms. Horvath's ADEA claims are not properly before this Court. This Court, in its Memorandum and Order dated November 24, 1993, previously granted partial summary judgment for defendant on any and all of

Ms. Horvath's disparate treatment claims based on ADEA. In bringing ADEA claims in her amended complaint, Ms. Horvath has acted in direct contravention of this Court's previous rulings. Moreover, Ms. Horvath has not alleged any new information which warrants reconsideration of her ADEA claims.

When Ms. Borza, after numerous submissions to this Court, attempted to salvage her complaint with a disparate impact theory in her December 10, 1993 filing, this Court granted Ms. Horvath the opportunity to file a disparate impact claim or any other claim which she desired to pursue. After reviewing Ms. Horvath's newly-fashioned disparate impact claim, this Court concludes that said claim lacks merit.

Disparate impact claims "involve employment practices that are facially neutral in their treatment of different

groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 325 n.15 (1977). Ms. Horvath does not, and indeed cannot, point to a neutral employment practice used by defendant which adversely affects older employees. Rather, her claim of constructive discharge is a claim of disparate treatment, ie., it requires proof of specific intent to discriminate on the part of an employer. Constructive discharge claims, by their nature, require proof of discriminatory intent. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); see also Teamsters, 431 U.S. at 335 n.15 (under disparate treatment theory "[p]roof of discriminatory motive is critical"). Accordingly, Ms. Horvath has not stated a disparate impact claim upon

which relief may be granted.

This Court notes additionally that Ms. Horvath has not exhausted the required administrative remedies before bringing her ADEA claim. Under the ADEA, a person must file a timely charge of discrimination with the EEOC prior to bringing a lawsuit in federal court. 29 U.S.C. § 626(d); see Hamilton v. 1st Spruce Bank, 928 F.2d 86, 87 (4th Cir. 1990). In her complaint, Ms. Horvath acknowledges that she has not filed an administrative complaint with the EEOC challenging her alleged constructive discharge. However, she states that such failure is not fatal to her claim because she is "an intervenor in an on-going 'live' ADEA case." Am. Comp., p. 5. However, this Court, in its November 24, 1993, Memorandum and Order dismissed all of Ms. Borza's claims. Thus, there is no "live" controversy to which Ms. Horvath may attach her non-exhausted claims.

(6) The interrogatories served on defendant by Ms. Horvath in large part attempt to seek information which would support an ADEA claim. Because this Court has already ruled that Ms. Horvath may not bring an ADEA claim, and because Ms. Horvath's disparate impact theory under ADEA is futile, the defendant has properly objected to the interrogatories as exceeding the permissible scope of discovery. To the extent the interrogatories attempt to gain information with which to support an ERISA claim, this Court will not require defendant to respond to them. As explained infra, Ms. Horvath has not alleged an appropriate basis for an ERISA claim.

(7) In her amended complaint, Ms. Horvath contends that defendant violated ERISA by causing older employees to resign "in order to further Hallmark's policy and the onerous illegal pattern and practice of

. . . diverting Hallmark's large bonus and pension benefits to executives rather than to the terminated employees." Am. Comp., p. 7. However, the evidence Ms. Horvath presents in support of her claim is entirely speculative. She states that in March 1993 she attended a convention for Hallmark employees where she estimates that approximately 1,000 persons with positions similar to her were present. From her observations at the convention, she estimates that at least 35% of the persons were over 40. She further alleges that in conversations with supervisors and co-workers at the convention she learned that defendant had a policy of terminating 25% of older employees. She provides no specific names of those with whom she spoke, when those conversations occurred, or the specifics of the contents of those conversations.

In contrast to Ms. Horvath's

conclusory allegations, a review of the information submitted by defendant reveals that executives did not monetarily benefit from Ms. Horvath's resignation or the resignation of any other older employee. Vested employees are allowed to sue under ERISA for future benefits denied them. Conkwright v. Westinghouse Electric Corp., 933 F.2d 231, 236 (4th Cir. 1991). However, the employee must prove "specific intent on the part of the employer to interfere with the employee's pension rights." Id. at 239. Ms. Horvath's only allegations which arguably go to the issue of specific intent are those which state that defendant sought to enrich its executives at the expense of older employees. However, the information provided by defendant in its January 7, 1993 filing, pp. 9-11, refutes Ms. Horvath's allegations that Hallmark executives were enriched by her

constructive discharge. Furthermore, to the extent Ms. Horvath alleges that defendant simply wanted to save money by firing her, such action by defendant does not violate ERISA. Conkwright, 933 F.2d at 239 ("Conkwright's suggestion that Westinghouse acted illegally because it acted to save money proves too much. Under that reasoning any actions by an employer that result in savings would be suspect. It is obvious that benefit costs make up a large amount of the costs of an employee to a company . . . but these undeniable propositions are not sufficient standing alone to prove the requisite intent . . . "). Thus, Ms. Horvath fails to allege the requisite intent to support an ERISA claim.

Furthermore, Ms. Horvath fails to allege a prima facie case of constructive discharge under ERISA. "A constructive discharge occurs when 'an employer deliberately makes an employee's working

conditions intolerable and thereby forces him to quit his job." Bristow, 770 F.2d at 1255 (citations omitted). "A plaintiff alleging constructive discharge must therefore prove two elements: deliberateness of the employer's action, and intolerability of the working conditions." Id. Ms. Horvath fails to allege either of these elements.

First, deliberateness requires a showing of intent, id. yet Ms. Horvath has not established that defendant deliberately sought to force her to quit. There is no evidence that defendant sought to cause Ms. Horvath to quit, only evidence that perhaps defendant was not entirely satisfied with Ms. Horvath's work. Nor is there any evidence that Ms. Horvath was singled out for any adverse treatment as compared to other account coordinators.

Second, and in this Court's view most significant, the conditions under which Ms.

Horvath worked were clearly not so intolerable that a "'reasonable person' in the employee's position would have felt compelled to resign." Id. She asserts the following incidents as those which led to her constructive discharge: (1) she was given conflicting instructions by her supervisor; (2) her supervisor embarrassed her at a regional meeting by admonishing her for organizing her papers during the last minutes of the conference; (3) two of her supervisors disrupted a meeting which she was conducting and later rebuked her for not having control of the meeting; (4) an executive blamed his failures to order enough holiday cards on account coordinators, specifically Ms. Horvath; (5) she had to conduct meetings with clients on three days she had taken off; (6) she received an inaccurate performance evaluation; and (7) she was privately reprimanded by her supervisor for the way

she hired an employee.

However, in her exit interview questionnaire, which she filled out following her resignation, she checked off boxes stating that the "working conditions" with defendant were "fair" and that she would recommend, "with reservations," defendant to a friend as a place to work. As for her reason for quitting, Ms. Horvath stated that she "was pressured into leaving" by her supervisor. She explained further that she "used to have control of my territory -- but after restructure and constant harassment on changing of the rules -- I got to a point where I didn't understand what was expected of me. Job was no fun anymore."

These sorts of complaints -- criticism, confusion, and pressure from a superior -- do not rise to a level recognized by the Fourth Circuit, which has instructed us that:

> "[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge. Every job has its frustrations, challenges and disappointments; these inhere in the nature of the work. An employee . . . is not, however, guaranteed a work environment free of stress. The employment discrimination laws . . . . cannot be transformed into a palliative for every workplace grievance, real or imagined, by the simple expedient of quitting."

Bristow, at 1255. Ms. Horvath has not alleged facts which rise to the level of intolerable working conditions.

Because she has not demonstrated that defendant intended to interfere with her pension rights, and because she has not

make out a prima facie claim of constructive discharge. Ms. Horvath's individual ERISA claim must fail. In the light of the fact that Ms. Horvath does not have an individual claim under ERISA, she may not serve as a class action representative, and accordingly, her motion to certify a class will also be denied. See International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1269 (4th Cir. 1981).

(8) In accordance with the foregoing discussion in this Memorandum and Order, defendant's motion for summary judgment is hereby GRANTED. As a result, all other pending motions have become MOOT. Judgment in both cases will be entered for defendant in a separate Order of even data herewith.

(9) Copies of this Memorandum and Order and the above mentioned separate Order are today being sent to counsel of record.

(10) It is so ORDERED this 14th day of February 1994.

/s/
Senior United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Margaret Ann Borza, etc.

vs. Civil No. K-92-240
Hallmark Cards, Inc., etc.
et al.

O R D E R

IT IS ORDERED this 12 day of January 1994 pursuant to Rule 11(e) of the Federal Rule of Appellate Procedure, that the record in this case be retained for the use by this Court in the ongoing litigation. The Court further Orders that the Plaintiff's Notice of Appeal received January 3, 1994 and any transcript which may be ordered for purposes of appeal are excepted from this Order and will be transmitted to the United States Court of Appeals, for the Fourth Circuit, together with a copy of this Order, the docket entries and copies of such pleadings as the parties may designate, such copies to be furnished by counsel.

/s/
UNITED STATES DISTRICT JUDGE
Peter J. Messitte

Jan. 13, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

MARGARET ANN BORZA, ETC. *

v. * K-92-240

HALLMARK CARDS, INC., ETC.
ET AL. *

MEMORANDUM AND ORDER

(1) Reference is hereby made to plaintiff's motion seeking to file an amended complaint, filed July 6, 1993, defendant's opposition thereto filed July 26, 1993, and plaintiff's motion to add an intervening party as plaintiff and as a co-class representative filed August 4, 1993. Plaintiff's motion so to amend her complaint is hereby GRANTED.

Plaintiff filed the within case on January 27, 1992, alleging that defendant discriminated against her on the basis of age, in violation of the ADEA, when it discharged her on August 27, 1985. Plaintiff was 47 years old and had worked for the Ambassador Cards Division of Hallmark Cards, Inc. as an Account

Coordinator for over 11 years when she was so terminated from her employment. Plaintiff asserts that the reason given by her employer for her termination was that she had lost one of her accounts. However, plaintiff alleges that the true reason for her termination was that she was a senior employee nearing the full vesting of her benefits and that Hallmark terminated her as part of a pattern of terminating its senior employees in order to avoid paying them higher salaries and benefits.

In the Memorandum and Order dated February 17, 1993, this Court ordered the parties to submit briefs with regard to the issue of whether plaintiff's claim is barred by the statute of limitations applicable to ADEA suits.

In its filing of April 26, 1993, defendant asserted, among other arguments, that plaintiff's ADEA lawsuit should be dismissed because she has failed to state a

viable ADEA claim in the light of the recent Supreme Court decision in Hazen Paper v. Biggins, 123 L.Ed.2d 338 (1993). In its May 28, 1993, Memorandum to counsel, this Court noted that Hazen Paper appeared to preclude plaintiff's ADEA claim, but granted plaintiff the opportunity to file a motion to amend her complaint, to be supported by a memorandum of fact and law setting forth, in specific detail, the alleged violations of ADEA which plaintiff desired to assert. This court also requested that plaintiff set forth a basis for numerosity concerning her proposed certification of a class action.

(2) In her second amended complaint, filed on July 6, 1993, plaintiff alleges ADEA violations (Count I), ERISA violations (Count II), and a combined ADEA/ERISA violation (Count III) on behalf of herself and a proposed class of persons allegedly consisting of 25% of all over-40 years of

age persons employed by Hallmark since 1982.

(3) In her ADEA claim, plaintiff alleges that defendant fired her and other older workers for "age based" reasons and that the defendant sought to avoid paying older employees who had attained higher salary earnings and benefit levels. In its Opposition to Plaintiff's Motion to File a Second Amended Complaint, filed July 26, 1993, defendant argues that plaintiff's individual ADEA claim is barred by limitations and that plaintiff fails to state an ADEA claim under Hazen Paper. Defendant also contends that plaintiff's proposed ADEA class claims are barred by limitations, that plaintiff cannot represent an ADEA class because her administrative charge did not contain class claims, and that plaintiff has failed to propose a putative class whose members can opt into her lawsuit.

(4) Plaintiff's conclusory allegations of "age-based" discrimination do not satisfy either this court's instructions to allege "in specific detail" an ADEA violation or the requirement of the Fourth Circuit that plaintiff demonstrate that the "employee's age was a determining factor in the action in the sense that but for the employer's motive to discriminate against the employee because of the employee's age the employee would not have suffered the action." Tuck v. Henkel Corp, 973 F.2d 371, 374 (4th Cir. 1992). Plaintiff has simply removed her allegations of pension-based discrimination and replaced them with allegations of "age based" discrimination. Such "conclusory allegations of discrimination. . . do not state a claim upon which relief can be granted." Simpson v. Welch, 900 F.2d 33, 35 (4th Cir. 1990) (granting motion to dismiss where plaintiff failed to allege

specific incidents of discrimination).

As for plaintiff's assertion that defendant discharged her in order to avoid paying older employees higher salaries and benefits, such an argument in support of an ADEA claim is foreclosed by Hazen Paper, in which the Supreme court held that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." 123 L.Ed.2d at 346. Since salary, like pension benefits, is tied to seniority and not to age, plaintiff's ADEA claim fails. See Schibursky v. IBM, 820 F. Supp. 1169, 1177 (D. Minn. 1993) (under Hazen Paper, "[t]he firing of an employee to save salary costs resulting from seniority. . . does not violate the ADEA"). For the foregoing reasons, defendant's motion for partial summary judgment with regard to plaintiff's

individual ADEA claim is hereby GRANTED.[1]

(5) Because this court finds that plaintiff fails to set forth any specific facts from which a jury could find that Hallmark discharged plaintiff for age-based reasons, this Court need not address defendant's contention that plaintiff's ADEA claim is barred by the statute of limitations. Plaintiff's proposed ADEA class claim also necessarily fails as a result of this Court's conclusion that plaintiff does not allege an individual ADEA claim, since plaintiff is not an appropriate class action representative in view of the deficiencies of her own claim. International Woodworkers v. Chesapeake Bay Plywood, 659 F.2d 1259, 1269 (4th Cir. 1981).

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[1] On April 26, 1993, defendant filed a motion to dismiss in reliance on Hazen Paper. Because documents outside the pleadings are included in the record in this case, that motion is treated as one for summary judgment pursuant to Fed. R.Civ. P. 12(b) and 56.

(6) In her second amended complaint, plaintiff also alleges an ERISA violation (Count II). In Hazen Paper, the Supreme Court indicated that although pension based discrimination did not state a claim under the ADEA, such claims were cognizable under ERISA, 88 Stat. 895 § 510, 29 U.S.C. § 1140. Plaintiff contends, pursuant to § 510, that defendant had a policy of terminating 25% of its employees over age 40 in order to deprive them of their pension benefits. Defendant asserts that plaintiff's individual ERISA claim is barred by limitations and that her proposed class claims fail because plaintiff's allegations are conclusory and do not meet the requirements of Fed. R. Civ. P. 23(e).

(7) The limitations period governing plaintiff's ERISA claim is three years. Dameron v. Sinai Hosp. of Baltimore, Inc., 815 F.2d 975, 981 (4th Cir. 1987). Plaintiff was discharged from Hallmark on

August 27, 1985; thus, her ERISA right of action expired on August 27, 1988. Since plaintiff did not file the within suit until January 27, 1992, even the relation back provision in Fed. R. Civ. P. 15(c) would not help plaintiff avoid an asserted defense of limitations unless plaintiff, as she attempts to do, is able to avoid that bar because Hallmark's alleged pattern of terminating over-40 employees constitutes a meaningful "continuing violation." However, because "a layoff from employment constitutes a completed act at the time its occurs," there would not appear to be a continuing violation in the instant case. Lawson v. Burlington Industries, Inc., 683 F.2d 862, 863-64 (4th Cir. 1982), cert. denied, 459 U.S. 944 (1982). Plaintiff also argues that she filed a timely age discrimination suit with the EEOC and that such filing tolls the statute of limitations for her ERISA suit. However,

plaintiff provides no support for that contention and this Court can find none. Because plaintiff's individual claim is time-barred, she cannot represent a class of ERISA claimants. International Woodworkers, 659 F.2d at 1269-70. In accordance with the reasons stated supra, defendant's motion for partial summary judgment is hereby GRANTED as to plaintiff's individual ERISA claim and as to plaintiff's request to represent a class of ERISA claimants.

(8) Because this Court concludes that plaintiff has failed meritorialy to allege either an ADEA or an ERISA claim, plaintiff's combined ADEA/ERISA claim (Count III), which merely reiterates the allegations as to Counts I and II in hybrid form, must also fail. Defendant's motion for partial summary judgment as to Count III is therefore hereby GRANTED.

(9) On August 4, 1993, plaintiff

filed a Motion to Add an Intervening Party as Plaintiff, and as a Co-Class Representative. That motion seeks to add another former employee of Hallmark, Patricia Horvath, as a co-representative of plaintiff's class claims under ADEA, ERISA, and the joint ADEA/ERISA claim.

(10) In her motion to intervene, Ms. Horvath states with regard to Borza's ADEA count as set forth the in second amended complaint that she "agrees with the essence of the facts alleged therein," "adopts Borza's allegations as her own," and "specifically adopts Ms. Borza's claims under ADEA." Because this court has concluded that Borza has not stated an ADEA claim which can survive the Supreme Court's holding in Hazen Paper, Horvath's motion to intervene and/or join Borza as a co-representative in that claim must fail. There is simply no viable basis upon which Ms. Horvath should be permitted so to join

in this class either as an intervenor or as a class representative. Accordingly, plaintiff's motion to intervene and/or join as co-class representative is hereby DENIED as to the ADEA count and as to the joint ADEA/ERISA count (Count III of the amended complaint).

(11) Ms. Horvath also seeks to intervene in the ERISA count (Count II of the amended complaint). Although Ms. Borza is barred by limitations from serving as a class representative with regard to the ERISA count, Ms. Horvath is not. Ms. Horvath was allegedly fired on April 27, 1993, and is thus seemingly able to file an ERISA claim in this case within the three year limitations period. At this stage in the proceedings however, it is unclear whether the ERISA claim should proceed as a class action. Although plaintiff was directed to address how the plaintiff intends to satisfy the numerosity

requirement; the allegations set forth in the motion to amend fail to do so. The numbers alleged by plaintiff are speculative. Speculative assertions as to numerosity are not enough to support class certification. See, e.g., Rodriquez v. U.S. Dept. of Treasury, 131 F.R.D. 1, 6 (D.D.C. 1990). Further, plaintiff's calculations, as presented to date, are not mathematically understandable to this court. This court recognizes that limited discovery is permitted when necessary for determining whether a proper class action exists. See, Witten v. A.H. Smith & Co., 104 F.R.D. 398 (D. Md. 1984). Accordingly, if plaintiff does not have a basis for estimating how many over-40 employees worked at Hallmark and/or how many of those employees were discharged, plaintiff is directed so to inform this Court, in writing, by December 1, 1993, and this Court then expects to permit plaintiff to

engage in limited discovery by written interrogatory. If defendant objects to such limited discovery, defendant shall so inform this court as to its objections, and reasons therefore, and so do by December 16, 1993.

(12) "The plaintiffs have not moved for class certification at this time, but in order to avoid continuing and protracted litigation regarding the viability of potential class representatives' claims and the underlying claims of the class, this court will exercise the broad administrative and adjudicative power it possesses to guide the course of this class action suit." Davis v. Bethlehem Steel Corp., 600 F. Supp. 1312, 1323 (D. Md. 1985). Thus, this Court will treat the pending Motion to Intervene as a motion for certification of the class with regard to the ERISA count. All future filings with regard to the motion for certification

should address in specific detail whether the standards of Fed. R. Civ. P. 23(a) have been met, keeping in mind the Supreme Court's admonition in General Telephone co. of Southwest v. Falcon, 72 L.Ed.2d 740, 752 (1982), that class actions "may only be certified if the trial court is satisfied, after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied." Accordingly, plaintiff is directed to file a memorandum of fact and law in support of the motion for certification by December 6, 1993; defendant shall respond by December 29, 1993; and plaintiff may have until January 5, 1994 to file rebuttal, if any. This Court will not rule on the motion to intervene treated as a motion for class certification, as to the ERISA count at this time, and instead will wait for all relevant filings before so ruling.

This Court notes that when one

plaintiff is determined to be an inappropriate class representative, the suit may sometimes proceed in order to give the putative class an opportunity to find a proper class representative. Thus, it may be that in a given instance there is no need for a newly found class representative, if indeed one exists, to file a class action anew. See International Woodworkers, 659 F.2d at 1270 ("Since we hold that the district court acted prematurely in denying class certification, on remand it may permit a proper plaintiff or plaintiffs who claim discrimination in their initial assignment to present themselves to the court to pursue the claim as class representatives."); Davis v. Bethlehem Steel Corp., 600 F. Supp. 1312, 1325 (D Md. 1985) (affording to plaintiff's counsel the opportunity to identify one or more unnamed class members who could seek leave to be

substituted in the action as class representatives, in a context in which the claims of the members of the putative class were seemingly time-barred).

(13) Should this Court conclude that certification of an ERISA class is warranted, Ms. Borza will not be entitled to join in that class. "[P]laintiffs whose claims are time-barred may not participate in a class action suit in any capacity." 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 6.03 (1992).

(14) Copies of this Memorandum and Order are today being sent to counsel of record.

(15) It is so ORDERED, this 24th day of November 1993.

/s/

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

MARGARET ANN BORZA, ETC. *

v. * K-92-240

HALLMARK CARDS, INC., ETC. ET AL. *

MEMORANDUM AND ORDER

(1) Reference is hereby made to plaintiff's motion to certify for appeal to the Fourth circuit and motion for reconsideration filed December 10, 1993. Those motions are hereby DENIED for the reasons stated infra in this memorandum.

(2) Despite the numerous submissions by the parties since this case was instituted on January 27, 1992, plaintiff for the first time, in her December 10, 1993 filing, relies explicitly on disparate impact rather than disparate treatment and/or pattern and practice (which in and of itself is a disparate treatment theory). Further, plaintiff has not proffered in any specific detail facts supporting a disparate impact theory. Nevertheless,

plaintiff is hereby afforded the opportunity so to do in form appropriate under Federal Rule 56, as if that latter rule applied, provided plaintiff so does on or before December 28, 1993.

In that context, it is to be noted that both the majority and concurring opinions in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 123 L.Ed.2d 338 (1993), make it clear that the Supreme Court has not determined whether disparate impact is a viable theory under the ADEA. Since Hazen was decided by the Supreme Court, the Fourth Circuit has not addressed that question. However, the United States District Court for the Norther District of Illinois has addressed the issue and has held that Hazen precludes the use of the disparate impact theory in an ADEA case where the employer's actions have not been based upon "'inaccurate and stigmatizing stereotypes.'" E.E.O.C. v. Francis W.

Parker School, No. 91-C-4674, 1993 U.S. Dist. LEXIS 14917, at *1 (N.D. Ill. June 14, 1993) (citing Hazen, 113 S. Ct. at 1706). The court in Francis W. Parker is the only court to date which has addressed the narrow issue Ms. Borza seemingly wants to present, i.e., whether a disparate impact theory can be used to challenge employment decisions based on economic factors that correlate with age in the light of Hazen Paper. The court in Francis W. Parker rejected such an argument, stating that, "Hazen teaches that this kind of empirical correlation is not enough, standing alone, to support ADEA liability." Id. This court agrees.

Accordingly, if plaintiff files as afforded, by December 28, 1993, it will only be to protect the record for purposes of plaintiff's possible subsequent appeal in connection with that issue.

(3) If Ms. Horvath desires to proceed

on the basis of disparate impact, in the alternative or otherwise, or if class certification is being sought on that theory, Ms. Horvath should appropriately seek to amend the current pleadings to include a disparate impact claim. As of this date, partial summary judgment with respect to plaintiff's amended complaint filed July 6, 1993, has been granted. Thus, there is presently no complaint in this case. Accordingly, Ms. Horvath should file a proposed amended complaint relying on disparate treatment, disparate impact, or any other theory which she desires to assert, no later than December 28, 1993.

(3) Ms. Horvath's motion for certification may or may not be granted in this case. Even if class certification is granted in this case, Ms. Horvath may or may not be an appropriate class representative and may or may not be a member of the class. Thus, plaintiff's

counsel should determine whether Ms. Horvath wants to file a new case on behalf of Ms. Horvath in her individual capacity, for protective purposes, and inform this Court in that regard by December 28, 1993.

(4) The schedule set forth in paragraph 12 of this Court's November 24, 1993, Memorandum and Order and modified in the Order dated December 2, 1993, continues in full force and effect.

(5) Copies of this Memorandum and Order are today being sent to counsel of record.

(6) It is so ORDERED this 16th day of December 1993.

/s/

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

FRANK A. KAUFMAN
Senior United States District Judge
101 West Lombard Street
Baltimore, Maryland 21201
May 28, 1993

MEMORANDUM TO COUNSEL RE MARGARET ANN BORZA, ETC. V. HALLMARK CARDS, INC., ET AL., CIVIL NO. K-92-240

(1) Reference is hereby made to the April 26, 1993, filing by defendant Hallmark, and particularly to this discussion at page 15-17 thereof, in connection with the decision of Hazen Paper Co. v. Biggin, 1993 WL 117592 (U.S.) by the Supreme Court; to the May 14, 1993, filing by plaintiff, particularly at pages 6-7; and to the First Amended Complaint filed March 31, 1992, particularly at page 2, paragraph 2 and at pages 5-6, paragraph 12.

(2) The said First Amended Complaint is brought under the ADEA. It is not brought under ERISA. Nor, as far as this Court can ascertain at this time, would this case appear to be "the special case

where an employee is about to vest in pension benefits as a result of his age, rather than years of service, ..., and the employer fires the employee in order to prevent vesting." Hazen, 1993 WL 117592 (U.S.), at page 5.

(3) Plaintiff's allegations in paragraph 2 of the First Amended Complaint would indeed seem to assert, on a primary basis, the type of allegation which the Supreme court in Hazen has rejected as a per se basis for relief under the ADEA. In that light, plaintiff is hereby given until June 18, 1993, to file a motion further to amend plaintiff's First Amended Complaint, along with such proposed Second Amended Complaint, and to file a supporting memorandum of fact and law setting forth, in specific detail, the alleged violations of ADEA which plaintiff desires to assert and press with regard to her own individual claims and with regard to the individual

claims of each and every member of the class which plaintiff desires to bring into being. In that latter regard, plaintiff, of course, is not expected to be able to proffer such positions of all members of the proposed class, but only the positions of such class members as are known to plaintiff. The affidavit of plaintiff attached to her aforementioned May 14, 1993, filing does refer to 15 other persons besides plaintiff. That is not a large group of persons. Accordingly, plaintiff's memorandum, which should accompany plaintiff's filing due on or before June 18, 1993, should deal specifically with the numerosity requirement of plaintiff's quest for certification of a class.

(4) Defendant Hallmark shall respond to plaintiff's filing, due on or before June 18, 1993, by July 2, 1993. Thereafter, plaintiff may file rebuttal, if plaintiff so desires, not later than July

12, 1993.

(5) Defendant Klein need not take any action in this case pending further Order of this Court, unless defendant Klein desires so to do.

Very truly yours,
/s/
Frank A. Kaufman

cc: Court File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET ANN BORZA, ETC. *

v. * K-92-240

HALLMARK CARDS, INC., ETC.
ET AL. *

MEMORANDUM AND ORDER

(1) On February 12, 1993, this Court held a hearing in open court on the record in connection with Plaintiff's Motion to Alter or Amend the Judgment of this Court entered on November 16, 1992, and Defendant Hallmark's Motion for Summary Judgment. During the said hearing, it was agreed that plaintiff had made a timely demand for a jury trial in the within case. As discussed on the record, the ADEA provides for a right to a jury trial, and therefore, as also discussed on the record, should this case go forward to trial, it will be tried before a jury.

(2) During the February 12, 1993, hearing, this Court directed, and counsel agreed, that counsel would file a joint

status report by both counsel, or by one counsel, with the authority of the other, regarding the status of service on defendant Klein by February 26, 1993. If by February 26, 1993, the status of service on Klein is still unsettled, counsel are to inform this Court in the status report of a proposed specific procedure and time schedule for resolution of that issue.

(3) Although plaintiff included claims of sex discrimination and retaliation in her administrative charge, such claims are not included in the within case. The within case is brought solely under the Age Discrimination in Employment Act (ADEA). Therefore, no evidence will be introduced regarding the sex discrimination and retaliation claims, unless counsel for plaintiff informs this Court and defense counsel well in advance of trial that plaintiff will seek to introduce such evidence and the justification for so

doing.

(4) For the reasons stated on the record during the aforementioned hearing:

(a) Plaintiff's Motion to Alter or Amend the Judgment of this Court entered on November 16, 1992 is hereby GRANTED, and that Judgment is hereby STRICKEN.

(b) Defendant's partial summary judgment motion with respect to compensatory and punitive damages not being recoverable under the ADEA, is hereby GRANTED. As agreed by all counsel on the record, plaintiff may not assert those claims under the ADEA. Therefore, those claims are hereby STRICKEN in this case.

(c) Defendant's Motion for Summary Judgment on the other grounds stated in its filings to date is hereby DENIED, except as set forth below in paragraph 5 infra. Plaintiff has at no time received a written notice of the disposition of her case; therefore, the Age

Discrimination Claims Assistance Act, with its 1990 Amendments (ADCAA), is not inapplicable to the within case for the reason that plaintiff received a written notice of the disposition of her case. Also, plaintiff's claims are not barred by reason that she filed her complaint on January 27, 1992, one day after the extension period provided under the ADCAA, as January 26, 1992 fell on a Sunday. See Fed. R. Civ. P. 6(a. Further, plaintiff's claims are not barred by the doctrine of laches. In addition, there is a factual dispute as to whether plaintiff raised her class claims at the administrative level; accordingly, defendant's Motion for Summary Judgment on the ground that plaintiff's class claims are beyond the scope of the within case is DENIED as a question reserved for trial.

(5) During the February 12, 1993 hearing, defendant asserted that under § 3

(a) (3) (B) of the ADCAA, plaintiff is only afforded a filing extension thereunder if plaintiff is entitled to the three year statute of limitations for willful violations, rather than the two year statute of limitations for nonwillful violations, for only in that case would the statute of limitations run after April 7, 1988. Defendant further contended during the said hearing that the legislative history of the ADCAA reveals that in determining the applicability of the ADCAA, the two year statutory limitations period is solely applicable. This Court notes that it does appear that plaintiff is only afforded the filing extension under the ADCAA if plaintiff is entitled to the three year statute of limitations for willful violations. However, this Court makes no further comment concerning defendant's said argument at this time. Rather, this Court requires briefs with regard to this issue.

In such briefing, this Court asks counsel to address § 7(e) of the ADEA, 29 U.S.C. § 626(e), and the limitations period set forth thereunder, as such limitations provision is referenced in § 3 (a) (3) (B) of the ADCAA. In accord with the briefing schedule established by this Court and counsel on both sides during the hearing, defendant shall file a memorandum with regard to the above issue by February 19, 1993, plaintiff shall respond by February 26, 1993, and defendant may have until March 5, 1993 to file rebuttal if any. This Court will hold a hearing on this issue on March 26, 1993 at 10:00 a.m. in open court, unless this Court notifies counsel to the contrary.

(6) Copies of this Memorandum and Order are today being sent to counsel of record.

(7) It is so ORDERED, this 17th day of February, 1993.

/s/

Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET ANN BORZA, ET AL.
Plaintiffs

v. Civil No. K-92-240

HALLMARK CARDS, INC. and
JERRY KLEIN, District Manager
Defendants

: : : : : : :

ORDER

Judgment for defendant Hallmark Cards, Inc. is being entered this 16th day of November, 1992.

/s/
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARET ANN BORZA, ET AL.
Plaintiffs
v. Civil No. K-92-240
HALLMARK CARDS, INC. and
JERRY KLEIN, District Manager
Defendants

: : : : : : :

MEMORANDUM AND ORDER

(1) Pending before this Court is Defendant Hallmark's Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, for Summary Judgment. For the reasons stated in Defendant's Memorandum in Support of its Motion to Dismiss, or, in the Alternative, for Summary Judgment, this Court hereby grants Defendant's Motion to for Summary Judgment, pursuant to F.R. Civ. P. 56. Pursuant to Local Rule 105(6), this Court has determined not to hold a hearing in the within case.

(2) Specifically, this Court hereby grants Defendant's Motion for Summary Judgment because Plaintiff's claims are

barred by limitations. The Age Discrimination in Employment Act (ADEA) adopts the statute of limitations governing actions brought under the Fair Labor Standards Act, 29 U.S.C. 201 et seq.; 29 U.S.C. 626(e)(1), which provides that an action must be "commenced within two years after the cause of actions accrued, . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. 255(a). This cause of action accrued on August 27, 1985, when plaintiff was terminated from her employment. Plaintiff did not file the within action until January 27, 1992, a date beyond the statutory limitations period. While the Age Discrimination Claims Assistance Act of 1988 (ADCAA), Pub. L. 100-283, 102 Stat. 78, and its 1990 amendments, the Age Discriminations Claims Assistance Amendments of 1990, Pub. L. 101-

504, 104 Stat. 1298, have extended in some cases the applicable time period within which to file a suit, to 450 days beginning November 3, 1990, the ADCAA does not apply in the within case. The ADCAA provides in pertinent part that a civil action may be brought during the applicable extension period if "(2) the [Equal Employment Opportunity] Commission did not . . . (B) notify such person, in writing, of the disposition of such charge and of the right of such person to bring a civil action on such claim." The ADCAA is not applicable to the within case because plaintiff was timely notified of her right to bring q civil action and of the time limitations within which to bring such an action. Plaintiff was also notified of the disposition of her case by the EEOC. Thus, plaintiff's claims are barred by limitations. Accordingly, this Court hereby grants Defendant Hallmark's Motion

for Summary Judgment, and in a separate Order of even date herewith is entering judgment for defendant.

(3) Copies of this Memorandum and Order and of the said separate Order are being mailed today to counsel of record.

(4) It is so ORDERED this 16th day of November, 1992.

/s/
Senior United States
District Judge